

No. 15612

United States
Court of Appeals
for the Ninth Circuit

CRESCENT WHARF & WAREHOUSE COMPANY, a corporation, and PACIFIC EMPLOYERS INSURANCE COMPANY, a corporation,

Appellants,

vs.

WARREN H. PILLSBURY, Deputy Commissioner, United States Department of Labor, Bureau of Employees' Compensation, 13th Compensation District and WILLIAM LASCHE,

Appellees.

Transcript of Record

Appeal from the United States District Court
for the Southern District of California,
Southern Division

FILED

AUG 21 1957

PAUL P. O'BRIEN, CLERK

No. 15612

United States
Court of Appeals
for the Ninth Circuit

CRESCENT WHARF & WAREHOUSE COM-
PANY, a corporation, and PACIFIC EM-
PLOYERS INSURANCE COMPANY, a cor-
poration, Appellants,
vs.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

HIGGS, FLETCHER & MACK,
2250 Third Avenue,
San Diego 1, California.

For Appellee:

LAUGHLIN E. WATERS,
United States Attorney,

RICHARD A. LAVINE,
Assistant United States Attorney,
Chief, Civil Division.

JORDAN A. DREIFUS,
Assistant United States Attorney,
600 Federal Building,
Los Angeles, California. [1]*

* Page numbers appearing at bottom of page of original Transcript of Record.

In the District Court of the United States, Southern District of California, Southern Division

No. 1677—Civ., S. D.

CRESCENT WHARF & WAREHOUSE COM-
PANY, a corporation, and PACIFIC EM-
PLOYERS INSURANCE COMPANY, a cor-
poration, Plaintiffs,
vs.

WARREN H. PILLSBURY, Deputy Commissioner, United States Department of Labor, Bureau of Employees' Compensation, 13th Compensation District, and WILLIAM LASCHE,
Defendants.

COMPLAINT TO REVIEW COMPENSATION
ORDER AND FOR INJUNCTION

I.

This complaint is filed by plaintiffs for the purpose of reviewing and setting aside as not in accordance with law an order for the payment of compensation made by Deputy Labor Commissioner Warren H. Pillsbury for the 13th Compensation District, Bureau of Employees' Compensation, United States Department of Labor on October 19, 1954, which reaffirmed and confirmed a prior compensation order made by Albert J. Cyr on May 17, 1951; said order of October 19, 1954 purported to be by virtue of authority conferred upon said Deputy

Labor Commissioner Warren H. Pillsbury, by provisions of the Longshoremen's and Harbor Workers' Compensation Act, Title 33, U.S.C.A., Sec. 901 et seq.

II.

This Court has jurisdiction of the matters concerned in this complaint by provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. Sec. 921 (b).

III.

Crescent Wharf & Warehouse Company, a corporation duly organized and existing by virtue of the laws of the State of California, is made a party plaintiff to this action because it is the employer against whom the order for the payment of compensation to the employee has been made.

IV.

Pacific Employers Insurance Company, a corporation duly organized and existing by virtue of the laws of the State of California, is made a party plaintiff to this action because it is the insurance carrier for the employer plaintiff and is the party liable to the employer plaintiff on the orders herein complained of.

V.

Warren H. Pillsbury, as Deputy Labor Commissioner aforesaid, is made a party defendant herein, because it is his order dated October 19, 1954 of which complaint is hereby made.

VI.

William Lasche is made a party defendant herein because he is the employee and claimant in whose favor the order has been made.

VII.

Certain relevant portions of the said Longshoremen's and Harbor Workers' Compensation Act are as follows:

Section 902 (2) of Title 33, U.S.C.A. provides:

"The term 'injury' means accidental injury [3] or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury . . . "

Section 914 (f) of Title 33, U.S.C.A. provides:

"If any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 per centum thereof, which shall be paid at the same time as, but in addition to, such compensation, unless review of the compensation order making such award is had as provided in section 921 and an interlocutory injunction staying payments is allowed by the court as provided therein."

VIII.

A. On or about September 6, 1950, the claimant

above named was in the employ of the employer above named as a longshoreman in and about San Diego Harbor, State of California.

B. The claimant testified at a hearing held before Deputy Commissioner Albert J. Cyr, on April 4, 1951, that on September 6, 1950, claimant herein, while performing services as a longshoreman foreman for said employer, sustained injuries while jumping from the top of a hatch of about three feet in height; that he landed on his left foot, which gave way and allegedly caused muscular injury to left foot and leg. The claimant testified, and the evidence revealed, that said alleged injury occurred at about 7:30 to 8:00 P.M. of said date, but claimant continued to work the balance of his shift; that the day after the alleged injury there was no work available, but claimant worked in his regular employment the second day following [4] said alleged injury and continued to work for a period of eight to nine days thereafter; that nine or ten days after the alleged injury, claimant sought the services of F. Bruce Kimball, M.D., a physician of his own choice, who massaged the injured area and took x-ray photographs of the left hip, knee and leg of said claimant. Said x-rays disclosed no evidence of fracture, dislocation, or other skeletal abnormality in the hip region. The claimant testified that the condition of his left leg did not improve and that he voluntarily ceased being treated by Dr. Kimball and on October 9, 1950 sought the services of Wilfred M. Knudtson, D.O.; that on October 23, 1950,

Dr. Knudtson caused further x-ray photographs to be taken of his left leg and hip region and reported no evidence of a fracture line or fracture, though claimant's left leg was somewhat shorter than his right leg. Claimant further testified that from the period September 6, 1950, to November 7, 1950, he was unable to work for twelve intermittent days. Claimant testified that on November 7, 1950 he was climbing a step ladder in the garage of his home while off work; that while raising himself with his weight on his left foot and leg, he then standing on the second or third step of said step-ladder, his left leg gave way, causing him to step steeply backward and downward to the floor on his right foot, bringing his left foot to it; that his left leg gave way again after he stood on the floor, causing him to descend backwards on the floor with both legs stretched out in front of him; that he then suffered pain in his left hip and shortly thereafter, upon being medically examined and x-rayed, he was found to be suffering from a fracture of the neck of the left femur.

C. Application for compensation was made by the claimant and after due notice to the parties, a hearing was held on April 4, 1951 before Deputy Commissioner Albert J. Cyr; the parties and their counsel appeared and testimony was taken; [5] stenographic notes of the testimony were made and duly transcribed and filed of record with said Deputy Commissioner. To said claimants petition the employer and insurance carrier herein appeared

and answered, admitting that the claimant sustained a compensable injury and disability sustained by claimant after November 7, 1950, was the natural or the unavoidable result of the first injury; that said second injury was caused by the claimant's own intervening negligence or carelessness, and was not compensable because the added injury did not arise from the hazards of the employment; that the claim should be dismissed in part, and compensation awarded only for injury or disability suffered by the first injury.

D. On May 17, 1951, said Deputy Commissioner Albert J. Cyr made certain finding of fact, inter alia, that claimant's second fall and injury from the step ladder in his garage was "directly attributable" to the first injury of September 6, 1950; that claimant was entitled to compensation for temporary total disability from the date of such first injury. Whereupon plaintiffs were ordered to pay the lump sum of \$805.00, representing compensation benefits accruing from date of the original injury to the date of the hearing, April 4, 1951, and to pay thereafter the sum of \$35.00 per week during the continuance of the temporary total disability of said claimant, or until further order of the Deputy Commissioner.

E. On June 14, 1951, plaintiffs herein brought review proceeding in this Court wherein said compensation order was annulled in part and the file remanded to the Deputy Commissioner who then caused an appeal to be taken to the Circuit Court

of Appeals for the Ninth Circuit, and said Court on March 30, 1954, reversed the decision of this District Court and remanded the case to the Deputy Commissioner to hold another hearing and try a certain issue of fact, namely, whether or not [6] the second injury was or was not the natural or the unavoidable result of the first injury, instead of a finding that the second injury was "directly attributable" to the first injury.

IX.

In conformity with said order of the Circuit Court of Appeals, a second hearing was held on June 23, 1954 before Deputy Commissioner Warren H. Pillsbury, inasmuch as Albert J. Cyr had meanwhile been transferred to another Compensation District. The parties and their counsel appeared and additional testimony and evidence was taken; stenographic notes of the testimony were made and duly transcribed and filed of record with said Deputy Commissioner Warren H. Pillsbury. Pertinent portions of said hearing were as follows:

A. Medical experts offered additional testimony concerning the comparative extent of claimant's injuries after the first fall and the second fall. Dr. W. M. Knudtson stated that his written opinion rendered at the first hearing of April 4, 1951, to the effect that the first injury probably weakened structures around the head and neck of claimant's left femur, was merely a surmise as there was no objective evidence of any kind of such weakened struc-

tures. Dr. R. G. Lambert testified that because of the nature of claimant's injuries after the first fall and the second fall, it was his expert opinion that the injuries incurred by the second fall were not caused by the first injury and were not the natural or the unavoidable result of the first injury.

B. The claimant, William Lasche, testified additionally that on November 7, 1950, he was on the second step of a step ladder in his garage and was standing wholly on his left foot, when his left leg collapsed and he fell straight down, landing on the garage floor in a sitting position, with both legs out in front of him. [7]

C. Deputy Commissioner, Warren H. Pillsbury, caused an independent medical expert to examine the entire x-ray file submitted into evidence to determine if there was any evidence of a crack, fracture, or other weakness of claimant's left hip joint before the second injury of November 7, 1950. Said x-ray file was forwarded to the United States Public Health Service Hospital of San Francisco, State of California. Said independent medical examination revealed no radiographic evidence of a fracture of any kind of claimant's left hip region of x-ray films made after the first injury, but prior to the second injury. Some demineralization was noted in the proximal portion of the shaft of Claimant's left femur on x-ray film taken November 11, 1950—the first film in which a fracture of any kind is demonstrated, and which x-ray was taken after the second injury.

X.

Thereafter, on October 19, 1954, the Deputy Commissioner Warren H. Pillsbury reaffirmed and confirmed the original compensation order of May 17, 1951, except as to certain additional findings of fact appearing on pages 3-4 of said compensation order of October 19, 1954, viz:

1. "That the circumstances of said episode (claimant's fall from step ladder) do not disclose sufficient strain to the left leg or hip at the time claimant stepped down to the floor or at the time he sat down immediately thereafter to explain the occurrence of said fracture as the result of a new accident; . . . "

2. "That claimant probably sustained an open separation of the bone of the femur at the site of the fracture at the time he placed his weight on his left leg on the second or third step in ascending the step-ladder; . . . "

3. "That there was no negligence or want of ordinary care on the part of claimant in attempting to go up said step ladder; . . ." [8]

4. "That a comparison of the series of x-rays taken before and after November 7, 1950 shows some demineralization of the proximal portion of the shaft of the left femur in the x-ray of November 20, 1950, which could have resulted from disuse following the injury of September 6, 1950, and could have made said femur more prone to fracture; . . ."

5. "That considering the foregoing, including the probability of greater damage in the region of the left hip from the injury of September 6, 1950, than could be demonstrated with certainty by objective diagnosis, the Deputy Commissioner draws the conclusion and finds that the injury of September 6, 1950 caused a weakening of the femur in some way not fully disclosed and was a substantial contributing cause to the separation of said femur on November 7, 1950, and that therefore the additional disability sustained by claimant after November 7, 1950 was a natural result of the first injury of September 6, 1950 . . . "

Plaintiffs were then ordered to pay the lump sum of \$3850.00 representing compensation benefits accruing from May 14, 1952 to the date of the second hearing, June 23, 1954, and to pay thereafter medical expenses and the sum of \$35.00 per week until a change in claimant's total temporary disability, or until further order of the Deputy Commissioner.

XI.

The findings of fact set out in Paragraph X above, and the order and award of the Deputy Commissioner are not in accordance with the law and should be set aside for the following reasons:

1. That the medical evidence in the record is insufficient to sustain the finding that the additional disability incurred by claimant after the second accident of November 7, 1950, was a natural result of the first injury of September 6, 1950;

2. That there is in the record of the testimony in this case no competent evidence, medical or otherwise, to establish [9] the finding that the second injury in any way arose or occurred in the course of claimant's employment;

3. That is did not lie within the Deputy Commissioner's powers to render findings of fact based upon mere conjecture and prophesy, and statements of probability that are unsupported by any evidence do not constitute findings of fact;

4. That the findings of fact above set out are so manifestly arbitrary and unreasonable as to transcend the authority of said Deputy Commissioner whereupon he acted without and in excess of the jurisdiction of his office and his powers as a hearing officer;

5. That there is in the record of the testimony in this case no evidence whatsoever to support the award of compensation as ordered by said Deputy Commissioner, and the plaintiffs herein will be irreparably damaged if an interlocutory injunction is not granted and the payment of compensation under said award stayed, pending the final hearing on this complaint to reverse and set aside the award of compensation;

6. That claimant herein is financially irresponsible and if the order and award are set aside, plaintiffs would not be able to recover back payments which have been made pursuant to the award of said Deputy Commissioner, and plaintiffs would be

irreparably damaged because its judgment would be uncollectible;

7. That said order of the Deputy Commissioner is different than the ordinary compensation order in that substantial medical expenses have accumulated since the date of the second accident; such an amount is, in effect, an award of a lump sum, and to cause plaintiffs to pay such lump sum would cause additional irreparable damages where it appears that said award, as indicated, is unsupported by the evidence and plaintiffs would not be able to recover such lump sum payment if the order and award are set aside because of claimant's aforementioned financial irresponsibility; [10]

8. That the order of compensation and award violate the Fifth Amendment to the Constitution of the United States wherein plaintiffs would suffer irreparable damage by being deprived of their property without due process of law and without reasonable or adequate means or remedy for the recovery thereof.

XII.

The claim for compensation together with the duly transcribed notes of testimony and all evidence submitted at the hearing of June 23, 1954 and the award of the Deputy Commissioner are in the custody of the said defendant, Warren H. Pillsbury, and it is necessary for this Court to have possession of the papers and the records of said hearing, and all other relevant papers, transcribed notes of testimony, and evidence of the hearing of April 4, 1951,

which are believed to be in the custody of said defendant, in order to determine whether or not the award of said Deputy Commissioner Warren H. Pillsbury, was in accordance with the law.

XIII.

The plaintiffs herein have no adequate remedy at law and have no means for the redress of the wrongs whereof they herein complain except through injunction proceeding, mandatory or otherwise, to set aside the order and award herein referred to.

Wherefore, plaintiffs pray:

1. That a mandatory injunction be granted by and issued from this Court to defendant Warren H. Pillsbury, Deputy Labor Commissioner for the 13th Compensation District of the United States Employees' Compensation Commission, commanding him within fifteen (15) days from receipt thereof, to deliver to this Court or the Clerk thereof, a certified transcript of the transcribed notes of testimony and the award of compensation, and all other papers or matter relevant to the hearing conducted by him in the case of William Lasche vs. Crescent Wharf & Warehouse Co. and [11] Pacific Employers Insurance Co., Case No. 76-2740, wherein hearings were held on April 4, 1951, and June 24, 1954.

2. That an interlocutory injunction be issued restraining the said defendant Warren H. Pillsbury, Deputy Labor Commissioner for the 13th Compens-

sation District of the United States Employees' Compensation Commission, from enforcing said award of compensation or imposing any penalty upon the plaintiffs for not paying the installments and sums in accordance with said award and that said order and award be suspended during the pendency of this action.

3. That forthwith upon the filing of this Complaint, an order to show cause why an interlocutory injunction pending this suit should not be granted and made in like manner and effect as hereinbefore prayed.

4. That a permanent injunction be granted by and issued from this Court to the defendant Warren H. Pillsbury, Deputy Labor Commissioner for the 13th Compensation District of the United States Employees' Compensation Commission, perpetually restraining and enjoining the defendant from enforcing the aforesaid award of compensation.

5. That a mandatory injunction be granted by and issued from this Court to said defendant Warren H. Pillsbury, Deputy Labor Commissioner for the 13th Compensation District of the United States Employees' Compensation Commission, directing him to set aside the findings of fact heretofore made, and that he be ordered to make an order dismissing and disallowing said claim insofar as disability from the second injury of November 7, 1950 is considered and weighed in making an award for whatever disability occurred as a result of the first injury of September 6, 1950.

6. Plaintiffs pray such other and further relief as [12] the exigencies of the case may require.

Dated: November 15, 1954.

HIGGS, FLETCHER & MACK,

/s/ By JOHN W. BURNETT, JR.,

Attorneys for Complainants Crescent Wharf & Warehouse Company, a corporation, and Pacific Employers Insurance Company. [13]

Duly Verified.

[Endorsed]: Filed Nov. 16, 1954.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon filing of the verified complaint herein and upon motion of Higgs, Fletcher & Mack, attorneys for plaintiffs herein, it is ordered, adjudged and decreed that the defendants Warren H. Pillsbury, Deputy Labor Commissioner for the 13th Compensation District of the United States Employees' Compensation Commission, and William Lasche show cause, if any they have, before the District Court of the United States for the Southern District of California, Southern Division, at 10 a.m., on the 7th day of December, 1954, at the Court Room, U. S. Custom and Court House Building, in the City of San Diego, State of California, why a preliminary injunction should not issue pendente lite as prayed for in the complaint herein, enjoining

said defendants from enforcing a Compensation Order and Award issued [15] by Warren H. Pillsbury, Deputy Labor Commissioner for the 13th Compensation Commission, on October 19, 1954, being Case No. 76-2740, and further restraining said defendants from imposing any penalty upon the plaintiffs herein for not paying the installments and sums in accordance with said order and award, and that said compensation order and award be suspended during the pendency of the above action.

It is further ordered that, sufficient cause having been shown, service of this order, with copies of said complaint and motion for order to show cause contained therein, shall be sufficient notice and service to the defendants herein.

Dated: November 16, 1954.

/s/ BEN HARRISON,
United States District Judge.

[Endorsed]: Filed Nov. 16, 1954.

[Title of District Court and Cause.]

ORDER GRANTING PRELIMINARY INJUNCTION

This cause came on to be heard at this term upon an order to show cause granted November 16, 1954, upon motion of Higgs, Fletcher & Mack, attorneys for plaintiffs herein, for a preliminary injunction to enjoin defendants from enforcing or collecting any awards, sums, or penalties pursuant to a Compensa-

tion Order and Award dated October 19, 1954, Case No. 76-2740, issued by Warren H. Pillsbury, Deputy Labor Commissioner for the 13th Compensation District, Bureau of Employees' Compensation, United States Department of Labor.

It appearing to the satisfaction of the court from the verified bill of complaint herein, and after hearing counsel for the respective parties, that the plaintiffs are entitled to a judgment against the defendants restraining the commission and continuance of certain acts which, during the [24] pendency of this action, would produce injury to the plaintiffs herein, and that a good and sufficient cause of action exists against the defendants in favor of the plaintiffs for the relief demanded in the complaint and for a preliminary injunction order pending the trial of this action, the grounds of which, briefly stated, are as follows: (1) that a preliminary injunction may issue against a compensation order if it appears that substantial questions of law and fact exist and that irreparable injury can be prevented; (2) that a question of law exists as to whether claimant's injury is within the purview of the Longshoreman's Compensation Act; (3) that questions of law exist as to whether there is substantial evidence to support the findings of the Commissioner; as to whether he ignored proper evidence presented; as to whether he made findings based upon mere conjecture and probability; (4) that irreparable damage ensues where plaintiffs are ordered to pay a lump sum award of medical expenses to a financially irresponsible claimant,

It further appearing to the court that plaintiffs are without any adequate remedy at law and are entitled to the relief demanded in the bill of complaint enjoining and restraining defendants from enforcing said Compensation Order and Award, or imposing any penalties upon the plaintiffs herein for not paying said sums and awards, except that weekly disability payments of \$35.00 per week will continue to be paid to defendant William Lasche during the pendency of this action,

It is, on motion of Higgs, Fletcher & Mack, attorneys for the plaintiffs in this action,

Ordered, that the defendants, and their officers, agents, employees, and attorneys be, and they hereby are, [25] and each and every of them is jointly and severally enjoined and restrained from enforcing or collecting any awards, sums, medical expenses, or penalties, except weekly disability payments of \$35.00 per week which will continue to be paid by plaintiffs to defendant William Lasche during the pendency of this action.

But this injunction order shall not take effect unless and until the said plaintiffs, or some one for them, shall execute a bond, payable to the said defendant William Lasche, conditioned according to law, to be approved by the court or clerk of the court, in the penalty of \$2,000.00.

It appearing to the court that the defendants in said bill are all represented by the same counsel, it is further ordered that service of this order on such counsel shall be equivalent to personal service on them.

This order shall continue in force until revoked or modified by further order of the court.

Dated this 8th day of December, 1954.

/s/ BEN HARRISON,
United States District Judge.

Approved as to Form:

/s/ (Illegible)

Attorney for Defendants. [26]

[Endorsed]: Filed Dec. 8, 1954. Judgment Docketed and Entered Dec. 9, 1954.

[Title of District Court and Cause.]

ANSWER

Now come the Defendants and for their answer to the Complaint To Review Compensation Order And For Injunction herein, admit, deny and allege as follows:

I.

Admit the allegations contained in Paragraphs I, II, III, IV, V, VI, VII and XII of the Complaint To Review Compensation Order And For Injunction.

II.

Deny generally and specifically all of the allegations contained in Paragraphs VIII, IX and X of said Complaint To Review Compensation Order And For Injunction and alleges that all of the [27] facts and circumstances pertaining to the injury of William Lasche complained of herein are set forth

in the original proceedings of Deputy Commissioner Albert J. Cyr, a certified copy of which will be presented to the Court upon the hearing thereof, and the supplemental proceedings of Deputy Commissioner Warren H. Pillsbury, a certified copy of which will be presented to the Court upon the hearing thereof, and that said original proceedings are available to the plaintiffs for inspection.

III.

The defendants deny the allegations contained in Paragraph XI of said Complaint.

Further answering the Complaint, the defendants aver that it is shown by the certified copy of the record before Deputy Commissioner Cyr and Deputy Commissioner Pillsbury that the findings of fact and the compensation award complained of are supported by substantial evidence, and under the law such findings are final and conclusive and not subject to review; that at the trial the certified copy of the record before Deputy Commissioner Cyr and Deputy Commissioner Pillsbury will be offered in evidence by the defendants to be reviewed by the Court.

Wherefore, defendants pray that judgment be entered herein affirming said award in all respects and that the Complaint be dismissed.

LAUGHLIN E. WATERS,

United States Attorney,

MAX F. DEUTZ,

Assistant U. S. Attorney,

Chief of Civil Division,

/s/ MAX F. DEUTZ,
Assistant U. S. Attorney,
Attorneys for Defendants.

Affidavit of Service attached.

[Endorsed]: Filed Jan. 6, 1955.

[Title of District Court and Cause.]

REQUEST FOR SETTING FOR TRIAL

Now comes Crescent Wharf & Warehouse Company, a corporation, and Pacific Employers Insurance Company, a corporation, the plaintiffs in the above cause, and by their attorneys, Higgs, Fletcher & Mack, state that the above cause is now at issue and has been for at least five (5) days, and therefore requests the Court to set the within cause for trial.

Dated: February 7, 1955.

HIGGS, FLETCHER & MACK,
/s/ By JOHN W. BURNETT, JR.,
Attorneys for Plaintiffs. [30]

Affidavit of Service by Mail attached.

[Endorsed]: Filed Feb. 9, 1955.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR SUMMARY
JUDGMENT

To: Crescent Wharf & Warehouse Company, a corporation, and Pacific Employers Insurance Company, a corporation, and to Higgs, Fletcher & Mack, their attorneys:

You, and Each of You, Will Please Take Notice that the defendants, by and through the undersigned, will bring the above and foregoing Motion on for hearing before the above entitled Court, in the Courtroom of the Honorable Peirson M. Hall, United States District Judge, in the United States Custom & Court House, San Diego, California, on Monday, the 28th day of March, 1955, at the hour of 10 a.m. on that day, or as soon thereafter [33] as counsel can be heard.

Dated at Los Angeles, California, this 15th day of March, 1955.

LAUGHLIN E. WATERS,
United States Attorney,

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division,

/s/ MAX F. DEUTZ,
Assistant U. S. Attorney,
Attorneys for Defendants.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

Come now the defendants, by and through their attorneys, Laughlin E. Waters, United States Attorney, and Max F. Deutz, Assistant United States Attorney, and move the Court that it enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a Summary Judgment in their favor, pursuant to their prayer in their Answer on file herein, on the following grounds and for the following reasons:

I.

That the pleadings on file show that there is no genuine issue as to any material fact on this motion and that the defendants are entitled to a judgment as a matter of law. [35]

II.

That the within action is a review of administrative proceedings and an order for the payment of compensation made by Deputy Labor Commissioner Warren H. Pillsbury, for the 13th Compensation District, Bureau of Employees' Compensation, United States Department of Labor, on October 19, 1954; that said Order and the record upon which it is based are correct and proper and that said Order should be affirmed.

This Motion is based on and will be presented upon the records and files herein, all of the pleadings filed by the respective parties hereto, and the

certified records of compensation hearings before the Bureau of Employees' Compensation, dated October 19, 1954 and May 17, 1951, and upon the Memorandum of Points and Authorities attached hereto.

Dated this 15th day of March, 1955.

LAUGHLIN E. WATERS,
United States Attorney,

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division,

/s/ MAX F. DEUTZ,
Assistant U. S. Attorney,
Attorneys for Defendants.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed March 15, 1955.

[Title of District Court and Cause.]

STATEMENT OF GENUINE ISSUES IN OP-
POSITION TO DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT

I.

The legal memorandum of points and authorities of defendants in support of their motion for summary judgment correctly sets forth the findings of fact and awards of Deputy Commissioners Albert J. Cyr and Warren H. Pillsbury, dated May 17,

1951 and October 19, 1954 respectively. The annexed affidavit of Rex W. Looney, agent for the plaintiff insurance carrier herein, indicates the amount of compensation and medical expenses paid to claimant William Lasche by said carrier up to and including November 30, 1954.

II.

For a statement of the genuine issues that appear in this action, plaintiffs respectfully direct the Court's attention to Paragraph XI of the complaint herein. In substance the genuine issues are: [67]

1. Whether or not a consequential injury arises out of the employment where it is due to a new and added peril to which the employee has needlessly exposed himself.

2. Whether or not the District Court is bound to unqualifiedly accept the findings of the Deputy Commissioners.

3. Whether or not a causal relationship between the injury and the employment must be established before a compensation award is justified.

The memorandum of points and authorities previously filed, and the attached supplemental memorandum of points and authorities indicate the arguments and authority thereof as to why plaintiffs contend the above Commissioners' orders and awards should be annulled and the matter be referred to said Commissioners to fix, after a hearing if necessary, compensation for the period which the

original disability might have continued if the second accident had not occurred.

HIGGS, FLETCHER & MACK,
/s/ By JOHN W. BURNETT, JR.,
Attorneys for Plaintiffs. [68]

Affidavit of Service by Mail Attached.

Pacific Employers Insurance Company
Home Office: 1033 S. Hope St., Los Angeles 15, Cal.

Statement of payments made to and on behalf of
William Lasche to and including November 30, 1954.
Indemnity paid to William Lasche..... \$7490.00
Medical and Hospital expenses paid..... 1966.10

Total \$9456.10

Self procured medical and hospital ex-
penses for which reimbursement is
claimed (Total of bills and receipts
transmitted by letter of Deputy Commis-
sioner dated November 24, 1954..... \$2181.73

The undersigned does hereby certify that the
above is a true and correct statement of the rec-
ords of Pacific Employers Insurance Company, and
that such records are kept under his supervision
and direction.

/s/ REX W. LOONEY.

State of California,
County of San Diego—ss.

On this 6th day of December, A.D., 1954, before
me, Louise Peper, a Notary Public in and for said

County and State, personally appeared Rex W. Looney, known to me to be the Branch Claims Superintendent of Pacific Employers Insurance Company and the person whose name is subscribed to the within Instrument and acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed by official seal the day and year in this certificate first above written.

[Seal] /s/ LOUISE PEPER,
Notary Public in and for said County and State.

My Commission expires August 15, 1957. [70]

Affidavit of Service by Mail Attached.

[Endorsed]: Filed March 25, 1955.

[Title of District Court and Cause.]

NOTICE OF CROSS-MOTION FOR SUMMARY JUDGMENT

To: Laughlin E. Waters, United States Attorney,
Max F. Deutz, Assistant United States Attorney,
Chief, Civil Division, 600 Federal Building,
Los Angeles 12, California, Attorneys for
Defendants:

Please take notice that upon the pleadings herein and the annexed Memorandum of Points and Authorities, upon all the proceedings and records on file herein, and the certified records of compensation hearings before the Bureau of Employees' Compensation dated October 19, 1954 and May 17,

1951, the undersigned will make a cross-motion before this Court upon the argument of your said motion in the United States Custom and Court House, San Diego, California, on Monday, the 28th day of March, 1955, at the hour [72] of 10:00 a.m., or as soon thereafter as counsel can be heard, for an order, pursuant to Rule 56 of Federal Rules of Civil Procedure, directing that summary judgment be entered in favor of the plaintiffs herein, and for such other and further relief as the Court may deem just.

Dated: March 25, 1955.

HIGGS, FLETCHER AND MACK,
/s/ By JOHN W. BURNETT, JR.

Attorneys for Plaintiffs. [73]

Affidavit of Service by Mail Attached.

[Endorsed]: Filed March 28, 1955.

[Title of District Court and Cause.]

ORDER REMANDING CASE TO COMMISSIONER

The Commissioner, on rehearing, made a finding that "there was no negligence or want of ordinary care on the part of claimant in attempting to go up" the stepladder which attempt preceded his second injury, resulting in this dispute.

That finding is not in accord with the Opinion of the Court of Appeals in *Cyr et al. v. Crescent Wharf, etc.* (9 Cir. 1954) 211 F. 2d 454, which pro-

vided that the case be remanded to the Commissioner "to try the issue as to whether the second injury was or was not the natural or the unavoidable result of the first injury."

Lack of negligence or the exercise of ordinary care does not mean that the second injury was either the natural or the unavoidable result of the first injury.

The case is remanded to the Commissioner with directions to make specific findings either from the present [87] record or such additional record as he may require, as to whether or not the second injury "was or was not the natural or the unavoidable result of the first injury."

Dated: Los Angeles, California, this 27th day of June, 1955.

/s/ PEIRSON M. HALL,
United States District Judge.

[Endorsed]: Judgment, Docketed. Entered and Filed June 27, 1955.

[Title of District Court and Cause.]

MOTION TO VACATE ORDER

The defendants move the Court to vacate its Order Remanding Case to Commissioner made and entered herein on June 27, 1955.

LAUGHLIN E. WATERS,
United States Attorney,

MAX F. DEUTZ,

Assistant U. S. Attorney,
Chief of Civil Division,

/s/ JOSEPH D. MULLENDER, JR.,

Assistant U. S. Attorney,
Attorneys for Defendants.

[Endorsed]: Filed August 3, 1955.

[Title of District Court and Cause.]

NOTICE OF MOTION

To the Plaintiffs Above Named and to Their Attorneys, Higgs, Fletcher and Mack:

You will please take notice that the defendant, Warren H. Pillsbury, by and through the undersigned will bring the within Motion on for hearing before the above Court in the Courtroom of the Hon. Peirson H. Hall, United States District Judge, at the Post Office and Courthouse Bldg., Los Angeles, California, on Monday, the 11th day of March, 1957 at 10 o'clock a.m. in the forenoon of that day or as soon thereafter as counsel can be heard.

Dated: This 25th day of February, 1957.

LAUGHLIN E. WATERS,

United States Attorney,

RICHARD A. LAVINE,

Assistant U. S. Attorney,
Chief of Civil Division,

/s/ JORDAN A. DREIFUS,
Assistant U. S. Attorney,
Attorneys for defendants. [91]

MOTION TO DISMISS

Warren H. Pillsbury, the defendant in the above entitled cause by Laughlin E. Waters, United States Attorney, Richard A. Lavine, Assistant U. S. Attorney and Jordan A. Dreifus, Assistant U. S. Attorney, his attorneys, moves the Court as follows:

I.

This action was commenced against the defendant, Warren H. Pillsbury on November 16, 1954 and the case is now under submission to the Court pursuant to the Order of the Court made August 2, 1955.

II.

This action was commenced against the defendant Warren H. Pillsbury in and on account of his official capacity as an officer of the United States, namely, as Deputy Commissioner, United States Department of Labor, Bureau of Employees Compensation, 13th Compensation District.

III.

On December 31, 1955, the defendant Warren H. Pillsbury retired and ceased to hold office as an officer of the United States including the above said office of Deputy Commissioner of U. S. Department of Labor, Bureau of Employees Compensation, 13th Compensation District.

IV.

The defendant Warren H. Pillsbury was succeeded in the above said office of Deputy Commissioner, U. S. Department of Labor, Bureau of Employees Compensation, 13th Compensation District by Charles F. Hanson on February 9, 1956.

V.

No Order substituting the successor in office of the defendant Warren H. Pillsbury as party defendant has been made although six months have expired since the successor took office. [92]

Wherefore, the defendant Warren H. Pillsbury moves that this action be dismissed.

LAUGHLIN E. WATERS,
United States Attorney,

RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief of Civil Division,

/s/ JORDAN A. DREIFUS,
Assistant U. S. Attorney,
Attorneys for Defendants.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed February 25, 1957.

[Title of District Court and Cause.]

STIPULATION OF CONTINUANCE

It Is Hereby Stipulated between the parties that the Motion to Dismiss made by the defendant, Warren H. Pillsbury, now pending, shall be continued to the 18th day of March, 1957, at 10 a.m. at the United States Court House, San Diego, California, before the Hon. Jacob Weinberger, United States District Judge.

It Is Further Stipulated that the plaintiffs may at the same time, date and place, bring on for hearing any motion of their own relating to substitution of another defendant in the place and stead of the defendant, Warren H. Pillsbury.

HIGGS, FLETCHER & MACK,

/s/ By JOHN W. BURNETT,

Attorneys for Plaintiffs. [97]

LAUGHLIN E. WATERS,

United States Attorney,

RICHARD A. LAVINE,

Assistant U. S. Attorney,

Chief of Civil Division,

/s/ JORDAN A. DREIFUS,

Assistant U. S. Attorney,

Attorneys for Defendants.

It Is So Ordered: This 11th day of March, 1957.

/s/ JACOB WEINBERGER,

U. S. District Judge. [98]

[Endorsed]: Filed March 11, 1957.

[Title of District Court and Cause.]

NOTICE OF MOTION

To the Defendants Above Named and to Their Attorneys, Laughlin E. Waters, United States Attorney; Richard A. Lavine, Assistant U. S. Attorney, Chief of Civil Division; Jordan A. Dreifus, Assistant U. S. Attorney:

You will please take notice that the plaintiffs, by and through the undersigned, will bring the within motion on for hearing before the above court in the courtroom of the Honorable Peirson M. Hall, United States District Judge, at the post office and courthouse building, San Diego, California, on Monday, the 18th day of March, 1957, at 10:00 o'clock a.m. in the forenoon of that day, or as soon thereafter as counsel can be heard.

This notice of motion has been shortened as far as time of service by the written stipulation previously filed between the respective attorneys of the parties herein.

Dated this 14th day of March, 1957.

HIGGS, FLETCHER & MACK,
/s/ By JOHN W. BURNETT, JR.,
Attorneys for Plaintiff. [100]

MOTION FOR SUBSTITUTION NUNC PRO TUNC

Plaintiffs, by and through their attorneys of record, Higgs, Fletcher & Mack, by John W. Burnett,

Jr., move the court for an order substituting Charles F. Hanson as one of the defendants herein in place of Warren H. Pillsbury, Deputy Commissioner, United States Department of Labor, Bureau of Employees' Compensation, 13th Compensation District, on the ground that the term of office of said Warren H. Pillsbury apparently expired on December 31, 1955; that said Charles F. Hanson apparently took office as said Deputy Commissioner on February 9, 1956, and now holds such position; and that there is substantial need for continuing this action against said Charles F. Hanson, as more particularly appears from the affidavit of John W. Burnett, Jr., Esq. attached hereto.

Plaintiffs further move the court that the aforesaid substitution be entered in the above file, nunc pro tunc, as of August 4, 1956, which date is within six months of the date that said Charles F. Hanson took office as aforesaid.

HIGGS, FLETCHER & MACK,

/s/ By JOHN W. BURNETT, JR.,

Attorneys for Plaintiffs. [101]

AFFIDAVIT IN SUPPORT OF MOTION FOR
SUBSTITUTION NUNC PRO TUNC BY
JOHN W. BURNETT, JR.

State of California

County of San Diego—ss.

John W. Burnett, Jr., Esq., being first duly sworn, deposes and says:

That he is one of the attorneys of record for

plaintiffs in the above-entitled action; that he makes the within affidavit in support of motion for substitution nunc pro tunc for the reason that he is more cognizant of the facts and status of the within action than anyone else connected in the matter; that the above action is a complaint for judicial review and injunctive relief of a compensation order dated October 19, 1954, made by Deputy Labor Commissioner Warren H. Pillsbury which reaffirmed a prior compensation order made by Albert J. Cyr on May 17, 1951.

That on December 8, 1954, a preliminary injunction was granted by United States District Judge Ben Harrison enjoining defendants from enforcing the aforesaid compensation order of October 19, 1954, issued by Warren H. Pillsbury.

That the above matter was submitted after hearing to decision before United States District Judge Peirson M. Hall in July of 1955, and is still under submission before said Judge.

That prior to receipt of defendants' motion to dismiss, and accompanying affidavit of William D. Driscoll in support thereof, affiant had no notice or knowledge, express or implied, that defendant Warren H. Pillsbury had retired as Deputy Commissioner as of December 31, 1955, or that Charles F. Hanson was, on February 9, 1956, appointed as successor in office to Warren H. Pillsbury.

That the compensation order of said Warren H. Pillsbury, dated October 19, 1954, becomes final under the provisions of [104] Title 33 U.S.C. Section 921 within thirty days, unless judicial review

is sought prior to that time. The effect of abating and dismissing the within action automatically means, by operation of law, that the said compensation order is final and conclusive, from which plaintiffs would not be entitled to further judicial review; that one of the allegations of plaintiffs' complaint was that the compensation order of said date violated the Fifth Amendment to the Constitution of the United States wherein plaintiffs would suffer irreparable damage by being deprived of their property without due process of law and without reasonable or adequate means of remedy for the recovery thereof; that there is a substantial need for continuing this action against the successor of Warren H. Pillsbury in order to settle the constitutional question raised, and in addition, by operation of Title 33 U.S.C. Section 918, said Charles F. Hanson, as successor Deputy Commissioner, is by law directed and with power to enforce the provisions of the aforesaid compensation order.

/s/ JOHN W. BURNETT, JR.

Subscribed and sworn to before me this 14th day of March, 1957.

[Seal] /s/ BILLIE J. COOPER,
Notary Public in and for said County and State.

My Commission Expires Janary 24, 1961. [105]

Affidavit of Service by Mail Attached.

[Endorsed]: Filed March 14, 1957.

tions having been brought on for hearing on March 18, 1957; and for further hearing on March 29, 1957; at both hearings the plaintiffs being represented by Higgs, Fletcher & Mack by [119] William Sommer, Esq., the defendant being represented by Laughlin E. Waters, United States Attorney, Richard A. Lavine and Jordan A. Dreifus, Assistant U. S. Attorneys, by Jordan A. Dreifus, Assistant U. S. Attorney; the parties having submitted Affidavits and made arguments both oral and written, the Court, being fully advised in the premises and having made and filed its Memorandum on March 29, 1957, makes the following Findings of Fact, Conclusions of Law and Judgment with respect to this case:

Findings of Fact

1.

This action was commenced against the defendant, Warren H. Pillsbury, on November 16, 1954 and the case has been under submission to the Court pursuant to the Order of the Court made August 2, 1955.

2.

On November 16, 1954, the defendant, Warren H. Pillsbury, held office as Deputy Commissioner, United States Department of Labor, Bureau of Employees Compensation, 13th Compensation District, which was an office of the United States.

3.

This action was commenced against the defend-

ant seeking review of and the setting aside of an Order made by him in his official capacity in the above named office.

4.

On December 31, 1955, the defendant, Warren H. Pillsbury retired and ceased to hold office as Deputy Commissioner of the United States Department of Labor, Bureau of Employees Compensation, 13th Compensation District.

5.

On February 9, 1956, the defendant, Warren H. Pillsbury, was succeeded in the above said office of Deputy Commissioner, [120] United States Department of Labor, Bureau of Employees Compensation, 13th Compensation District, by Charles F. Hanson.

6.

More than six months has expired since the said Charles F. Hanson so succeeded the defendant, Warren H. Pillsbury.

7.

Prior to March 14, 1957, no motion was filed nor was any order made substituting Charles F. Hanson for the defendant, Warren H. Pillsbury in this suit.

Conclusions of Law

1.

This is a suit by the plaintiffs under the provisions of the United States Code, Title 33, Section 921(b), seeking review of an order for payment of

compensation by way of injunction proceedings against a Deputy Commissioner.

2.

The provisions of Rule 25(d), Federal Rules of Civil Procedure, concerning substitution of an officer of the United States who is a party to a suit, apply to this suit.

3.

Where the successor in office of a public officer is not substituted in the suit as a party within the time prescribed in Rule 25(d), the suit must abate as a matter of law.

4.

This suit has therefore abated as a matter of law as to the defendant, Warren H. Pillsbury.

5.

As to the defendant, William Lasche, this Court lacks jurisdiction over the subject matter of the suit. [121]

6.

As to the defendant William Lasche, the Complaint on file herein fails to state a claim upon which relief can be granted.

7.

Judgment should be entered dismissing this suit.

8.

Let judgment be entered accordingly.

Judgment

In accordance with the foregoing Findings of Fact and Conclusions of Law,

It Is Ordered, Adjudged and Decreed:

1.

That the plaintiffs' Motion for Substitution nunc pro tunc be denied.

2.

That the defendant's Motion to dismiss this suit be granted.

3.

That this suit be and is hereby dismissed.

4.

The parties shall bear their respective costs.

Dated: This 16th day of April, 1957.

/s/ JACOB WEINBERGER,

Judge, U. S. District Court. [122]

Affidavit of Service by Mail Attached.

[Endorsed]: Lodged April 3, 1957. Filed April 17, 1957. Docketed and Entered April 19, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE UNITED
STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

Notice is hereby given that the plaintiffs, Crescent Wharf & Warehouse Company, a corporation, and

Pacific Employers Insurance Company, a corporation, hereby appeal to the United States Court of Appeals, for the Ninth Circuit, from the judgment denying plaintiffs' motion for substitution nunc pro tunc; granting defendants' motion to dismiss the suit, and ordering that the suit be dismissed, entered in this action on April 19, 1957.

Dated at San Diego, California this 24th day of May, 1957.

HIGGS, FLETCHER & MACK,

/s/ By WILLIAM E. SOMMER,

Attorneys for Plaintiffs. [124]

Affidavit of Service by Mail Attached.

[Endorsed]: Filed May 27, 1957.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled cause:

A. The foregoing pages numbered 1 to 131, inclusive, containing the original:

Complaint to Review Compensation Order and for Injunction;

Order to Show Cause;

Memorandum in Opposition to Motion for Preliminary Injunction;

Order Granting Preliminary Injunction;

Answer;

Requesting for Setting for Trial;

Motion and Notice of Motion for Summary Judgment; and Memorandum of Points and Authorities in Support thereof;

Statement of Genuine Issues in Opposition to Defendants' Motion for Summary Judgment;

Notice of Cross-Motion for Summary Judgment;

Supplemental Memorandum of Points;

Order Remanding Case to Commissioner;

Motion to Vacate Order;

Motion and Notice of Motion to Dismiss; Memorandum of Points and Authorities in Support thereof; and Affidavit of William D. Driscoll;

Stipulation for Continuance;

Motion and Notice of Motion for Substitution nunc pro tunc; Memorandum in Support thereof; and Affidavit of John W. Burnett, Jr.;

Supplemental Memorandum by Government;

Supplemental Memorandum by Plaintiffs;

Findings of Fact, Conclusions of Law and Judgment;

Notice of Appeal;

Designation of Contents of Record on Appeal;

Counter-Designation of Record on Appeal;

B. One volume of Reporter's Official Transcript of Proceedings had on March 29, 1957.

I further certify that my fee for preparing the foregoing record, amounting to \$1.60, has been paid by appellant.

Witness my hand and seal of the said District Court this 25th day of June, 1957.

[Seal] JOHN A. CHILDRESS,
 Clerk,
/s/ By CHARLES E. JONES,
 Deputy.

In the United States District Court, Southern
District of California, Southern Division

No. 1677-SD-W

CRESCENT WHARF & WAREHOUSE COM-
PANY, a corporation, and PACIFIC EM-
PLOYERS INSURANCE COMPANY, a cor-
poration, Plaintiffs,

vs.

WARREN H. PILLSBURY, Deputy Commis-
sioner, United States Department of Labor,
Bureau of Employees' Compensation, 13th Com-
pensation District, and WILLIAM LASCHE,
Defendants.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

San Diego, California

Friday, March 29, 1957, 2:00 P.M.

Honorable Jacob Weinberger, Judge Presiding.

Appearances: For the Plaintiffs: William E.
Sommer, of Counsel Higgs, Fletcher & Mack, 2250
Third Ave., San Diego 1, California. For the De-

fendants: Laughlin E. Waters, United States Attorneys, by Jordan A. Dreifus, Assistant U. S. Attorney.

(Other matters.)

The Court: Proceed with No. 2.

The Clerk: No. 2: 1677 — Crescent Wharf & Warehouse vs. Pillsbury, etc. Hearing of defendant's motion to dismiss; and motion of plaintiff to substitute party defendant nunc pro tunc.

The Court: This matter is now submitted without further argument. I think I have seen everything that you propose in the way of briefs and arguments.

Mr. Dreifus: Yes, your Honor.

The Court: I take it that you have nothing further to offer other than what you have already presented?

Mr. Dreifus: We have nothing further to say, your Honor, although I understood opposing counsel probably wanted to make some argument.

The Court: If he has something new to offer, but there is no use going over matters that you have already submitted.

Mr. Sommer: I think we have previously discussed with the Court the fact that we are relying on lack of due process of the case; and the other item is estoppel, and the fact that this particular case is not similar to any of the cases which counsel has cited previously. I think everything we have is in the record. [2]

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

The Court: You have presented that well on both sides, and the Court is now ready to announce the decision.

Mr. Sommer: All right. Fine, your Honor.

The Court: In November of 1954, an injunction proceeding to review a compensation order was filed against Warren H. Pillsbury, Commissioner. He is referred to as Deputy Commissioner here in the title of the plea.

Was he Commissioner or Deputy Commissioner?

Mr. Dreifus: Deputy Commissioner was his correct title.

The Court: All right.

The case was filed in San Diego, but due to the congestion of civil matters at that time, several of the judges participated in the case. On August 3, 1955, it was taken under submission on the merits in Los Angeles. After the first of this year, the case was sent back to San Diego while still under submission. The case was placed on the calendar of this Department of the Court, and further hearings were had. The matter is before us today on two motions. Briefs and arguments having been filed, the Court will now render its decision without hearing further from Counsel.

At this point, may I ask this question: Is there any person other than Pillsbury who was the commissioner in the case at the time? Was there any other commissioner?

Mr. Dreifus: No, your Honor. Mr. Pillsbury was the Commissioner for the Thirteenth Compensation

District which [3] handled the longshoremen's and harbor worker's compensation cases.

The Court: He is referred to here as Deputy Commissioner.

Mr. Dreifus: Yes, your Honor. I believe all of the regional officers who perform those duties are called deputy commissioners.

The Court: There is no one ahead of him, is that correct?

Mr. Dreifus: No one subject to this jurisdiction, I don't believe, your Honor. No one who was before the Court.

Mr. Sommer: Well, actually, your Honor, there was a case previous to this; the one that your Honor decided back in 1951, I think it was—or '52. That case was started after November 1950. The first hearing was held before Deputy Commissioner Cyr, C-y-r, on April 4, 1951.

The Court: Pillsbury took his place?

Mr. Sommer: Pillsbury replaced him, that is correct.

The Court: All right. I remember now.

I will continue with my decision.

It appears that in December of 1955, Pillsbury retired. Although attorneys for the Government and the reviewing parties had some correspondence after that time, the latter were not informed, and state they did not know of the retirement and appointment of a successor.

A motion to dismiss has been made by the Government on the ground that the action has abated by the retirement of [4] Pillsbury and the failure

of the reviewing party to substitute his successor within the six months period prescribed by Rule 25, Subdivision d, Federal Rules of Civil Procedure.

Counsel for the reviewing party have filed a motion to substitute Pillsbury's successor *nunc pro tunc* as of the proper time.

The Government relies mainly upon the case of *Snyder v. Buck*, 340 U. S. Reports 15, wherein one Admiral Buck, paymaster in the Navy, was sued in mandamus to compel him to pay a widow's allowance. Admiral Buck retired, and his successor was not substituted within the six months period.

The judgment had gone against the Government, and it had appealed. However, the Supreme Court ruled that the action had abated, and that the widow had lost her judgment obtained in the District Court. There were dissenting opinions by Justices Frankfurter, Jackson and Clark.

Another case cited by the Government is *Bowles v. Wilke*, 175 Fed. 2nd, Page 35. The suit was brought by Bowles as Administrator of the OPA; Porter succeeded him; and Fleming succeeded Porter. Over a year after Bowles resigned, the United States Attorney moved for a substitution, and the defendants moved to dismiss or abate the action. The Government argued that the United States was the real party in interest; but the Court of Appeals, after an interesting discussion, ruled that Section 25(d) of the Federal Rules of Civil [5] Procedure clearly applied, and the action had abated because there was no substitution of the

party plaintiff within the six months provided by the section.

Counsel for the employer argue that this case is not the usual action against a United States official to enjoin the exercise of his governmental function, such as one to restrain the collection of a tax. There is support for this contention in *Bassett v. Massman Construction Co.*, 120 Fed. 2nd Page 230, a decision of the Court of Appeals of the 8th Circuit. At page 233 of the opinion it was observed:

“(3, 4) * * * This subdivision prescribes the procedure to be ‘through injunction proceedings.’ Although so described, the proceeding is purely one of judicial review of the action of an administrative agency. It lacks a cardinal characteristic of ordinary injunction proceedings directed at administrative orders in that there is (except as to jurisdictional issues) no trial de novo of the facts. (Then there are some cases cited.) Also, the reviewing court is acting really as a court in admiralty with the power to grant injunctive relief especially given by this section. (Again, there were some cases cited.) While the proceeding is injunctive, yet, being in the nature of a review proceeding, it is ‘somewhat analogous to an appeal.’ (More cases cited, one of them being *Associated Indemnity Corporation v. [6] Marshall*, 9 Cir. case, 71 Fed. 2nd, 235, 236.) In short, this proceeding is not the ordinary injunction but is a review proceeding in an admiralty court wherein Congress drew ‘upon another system of procedure to equip the court with

suitable and adequate means for enforcing the standards of the maritime law as defined by the act.''' (And there is another case cited:) *Crowell v. Benson*, 285 U. S. 22, 49.

The recent case of *Chauvers v. Hobby*, reported at 19 Federal Rules Decision at Page 393, also deals with an action which is in the nature of review. Section 405(g) of Title 42 USCA provides for a review by the District Court of the decision of the Administrator of Social Security. The decision of the administrator is made after a hearing had before him at which evidence is introduced. The review contemplated by the section is one analogous in procedure to the review provided for in the section involved in the case at bar, although the Social Security statute does not require that the action should be brought as an injunction proceeding.

In the *Chavers* case, Judge Madden of the New Jersey District Court quoted from Judge Leibell's opinion in *Rossello v. Marshall*, 12 Federal Rules Decisions, to the effect that Rule 25(d) is a harsh rule, but one which is mandatory and which allows no discretion in the district judge.

That the rule is indeed harsh is demonstrated by [7] the circumstances of this case before us. Counsel for Crescent Wharf and Warehouse Company have been industrious in their handling of this matter. The prior review of Mr. Pillsbury's decision regarding this employee was heard in my department of the District Court in about 1951; an appeal was taken, and the matter remanded back to

this Court for remand to the Commissioner. A further hearing was had before the Commissioner, and the present proceeding is a review from his decision. In our view of the case, a rather unusual point of law is involved, and it is one of which counsel for the reviewing party have made a most capable presentation in all their briefs and pleadings.

It is also our view that the failure to substitute Pillsbury's successor was excusable. We cannot see that any counsel is chargeable with neglect of duty in not ascertaining Pillsbury's retirement and the appointment of his successor. And we are satisfied that these matters were not known by the various counsel directly in charge of the case for the Government. Had they been known, ordinary professional courtesy would have indicated that mention of these facts be made to opposing counsel.

The majority opinion in *Snyder v. Buck* rather hinted that Congressional amendment might be desirable. The dissenting opinion of Justice Frankfurter described the state of the law as "compounded of confusion and artificialities". He observed at page 29 of the dissenting opinion that:

"the doctrine of sovereign immunity, whatever its historic bases—is hardly a doctrine based upon moral considerations."

He further observed:

"The trend of deep sentiment, reflected by legislation and adjudication, has looked askance at the doctrine."

(That is the end of the quote. I have quoted in some portions of this; I might not have called it to your attention but you can look at the copy after we are through here and see just where the quotes are.)

Congress has not yet seen fit to pass legislation to fit cases such as this, and to make effective the words of Justice Frankfurter found at page 30 of the *Snyder v. Buck* case, I quote:

“* * * it has long been the policy of our law to look behind an office-holder nominally a party litigant in order to find that, for all practical purposes, it is a suit against the Government and therefore not maintainable. Justice should be equally open-eyed in order to find behind the nominal official defendant the United States as the real defendant.”

Perhaps a situation such as we have here might be avoided if formal notice of vacancies such as that caused by Commissioner Pillsbury's retirement were given to the various [9] United States Attorneys, and they in turn would give notice to opposing counsel; or, the District Courts, in their supervision over the conduct of cases before them, might require the United States Attorneys to give notice of such matters to parties interested in each particular case.

It is our feeling that the review before us is entirely and essentially an appeal from the decision of Commissioner Pillsbury, with the Crescent Wharf and Warehouse Company as the Appellant,

and William Lasche the employee, as the Appellee. As such, the action should not abate because of the retirement of the man who rendered the decision, and the failure to substitute his successor, any more than an appeal should abate because of the retirement of a judge who rendered a decision, and the failure to substitute his successor.

This Court is bound, however, by the decision of the Supreme Court in *Snyder v. Buck*, and must hold that this action has abated.

The argument that the cause should be kept alive as to the employee is without merit. I cannot find any authority in the statute (Section 921 of Title 33) for joining him as a party defendant.

The Clerk will enter an order that counsel for the United States will prepare the proper order dismissing the action as to all parties, and serve and submit the same within ten days from today.

[Endorsed]: Filed April 12, 1957.

[Endorsed]: No. 15612. United States Court of Appeals for the Ninth Circuit. Crescent Wharf & Warehouse Company, a corporation, and Pacific Employers Insurance Company, a corporation, Appellants, vs. Warren H. Pillsbury, Deputy Commissioner, United States Department of Labor, Bureau of Employees' Compensation, 13th Compensation District and William Lasche, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Southern Division.

Filed: June 26, 1957.

Docketed: July 2, 1957.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15612

CRESCENT WHARF & WAREHOUSE COM-
PANY, a corporation, and PACIFIC EM-
PLOYERS INSURANCE COMPANY, a cor-
poration, Plaintiffs-Appellants,

VS.

WARREN H. PILLSBURY, Deputy Commissioner, United States Department of Labor, Bureau of Employees' Compensation, 13th Compensation District and WILLIAM LASCHE,
Defendants-Appellees.

STATEMENT OF POINT ON APPEAL AND
DESIGNATION OF RECORD, PROCEED-
INGS AND EVIDENCE TO BE CON-
TAINED IN RECORD ON APPEAL

To the Clerk of the Above Entitled Court:

The plaintiffs - appellants, Crescent Wharf & Warehouse Company, a corporation, and Pacific Employers Insurance Company, a corporation, intend to rely on the following point on appeal:

Whether Rule 25(d) of the Federal Rules of Civil Procedure operates to abate the action.

The plaintiffs-appellants hereby designate for inclusion the complete record and all the proceed-

ings and evidence in the action as material to the consideration of the appeal.

Dated: July 2, 1957.

HIGGS, FLETCHER & MACK,

/s/ By CHARLES L. COMIS,

Attorneys for Plaintiffs-Appellants.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed July 3, 1957. Paul P. O'Brien,
Clerk.

